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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMON MARSHALL NEWQUIST,

Defendant and Appellant.

E039086

(Super. Ct. Nos. FSB037368 &
FSB042723)

OPINION

APPEAL from the Superior Court of San Bernardino County. Douglas A. Fettel,
Judge. Reversed with directions.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, and Lilia E. Garcia and
Peter Quon, Jr., Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Damon Marshall Newquist (appellant) challenges the trial court's denial of his motion to withdraw his guilty plea. Appellant contends his mental condition prevented him from exercising his free and clear judgment when he pled guilty, his counsel was ineffective, and the trial court misunderstood the extent of its power to set aside the guilty plea. As discussed below, we conclude that the trial court did not conduct a meaningful hearing on the substance of appellant's motion to withdraw his plea. Therefore, we conditionally reverse the conviction and remand this matter to the trial court with directions to hold a hearing on the motion.

FACTUAL AND PROCEDURAL HISTORY

On July 17, 2003, appellant was charged with residential burglary (Pen. Code, § 459)¹ (the burglary case) after he broke into a neighbor's apartment through a bedroom window, was seen leaving through the front door, and was later found hiding in the bedroom closet of another apartment. The victim later indicated that some items were missing from her apartment. The information alleged that appellant had a prior "strike" conviction for robbery. (§§ 211 & 1170.12, subds. (a)-(d).) Appellant pled not guilty and denied the prior strike allegation. On August 15, 2003, appellant agreed to withdraw his not guilty plea. He entered a plea of guilty and admitted the prior strike allegation. However, immediately thereafter, the trial court allowed appellant to withdraw his guilty plea because counsel had misinformed appellant about the amount of time he would

¹ All further statutory references will be to the Penal Code unless otherwise indicated.

actually have to serve. On August 29, 2003, the trial court granted appellant's *Marsden*² motion and appointed new counsel.

On September 26, 2003, appellant again withdrew his not guilty plea and agreed to plead guilty to residential burglary. Under the plea agreement, appellant also admitted the prior strike allegation and was sentenced to 17 years in prison. In exchange, appellant was released that day under a *Vargas*³ waiver on the condition that his sentence would be reduced to eight years if he appeared on November 12, 2003, for sentencing and did not commit any criminal acts in the meantime.

Appellant did not appear for sentencing and so a bench warrant was issued for his arrest. On January 26, 2004, appellant was charged with three new crimes from the period during which he was out of custody on the *Vargas* waiver: forgery (§ 470, subd. (a)); commercial burglary (§ 459); and receiving stolen property (§ 496, subd. (a)) (the forgery case). He was arraigned on the bench warrant in the burglary case on January 28, 2004. The trial court denied bail.

Appellant was to be resentenced on the burglary case on February 25, 2004. On that date, he stated he wanted to withdraw his guilty plea. On March 24, 2004, defense counsel declared a doubt as to appellant's mental competence. The trial court suspended all proceedings pending assessment by a mental health professional. On April 28, 2004, the trial court reviewed the medical reports, found appellant competent, and reinstated all

² *People v. Marsden* (1970) 2 Cal.3d 118.

³ *People v. Vargas* (1990) 223 Cal.App.3d 1107.

proceedings. On that date, appellant again indicated he wanted to withdraw his guilty plea.

After numerous continuances, the trial court again granted appellant's *Marsden* motion on November 30, 2004. New counsel was appointed on December 7, 2004. At that time, appellant told the court he intended to file a motion to withdraw his guilty plea and a hearing on the possible motion was set for January 25, 2005. The matter was continued several times until June 21, 2005, when the trial court set a briefing schedule. Appellant filed his motion to withdraw the guilty plea on July 8, 2005, and the People filed their opposition on July 20, 2005.

After two more continuances, the hearing on appellant's motion was held on September 28, 2005. The minute order for that date indicates appellant withdrew the motion, but the reporter's transcript does not show that appellant did so on the record. The People presume for the purpose of this appeal that appellant did not withdraw the motion and we do so as well. In any case, the trial court sentenced appellant to 17 years pursuant to the *Vargas* waiver.⁴ This appeal followed.⁵

DISCUSSION

This court asked the parties to informally brief the issues of whether the trial court held a hearing on appellant's motion to withdraw his plea and whether the matter should

⁴ The trial court also sentenced appellant to 16 months in the forgery case, (consecutive to the 17 years in this case) pursuant to a plea agreement in which he pled guilty to forgery in exchange for dismissing the other two charges. Appellant does not challenge the sentence in the forgery case.

be remanded to the trial court to hold such a hearing. Appellant argues that the trial court did not conduct a meaningful hearing on the motion, did not even address the issue until after it had already sentenced appellant on the *Vargas* waiver, and did so only after appellant insisted that he wanted to discuss the issue on the record. Further, appellant argues that the trial court did not address any of the factual issues raised by his motion to withdraw the plea, including questions about his mental condition on the day of the plea.

The People argue that, in exchange for the trial court sentencing him on the *Vargas* waiver, thereby commencing the time period during which he could appeal his sentence, appellant did not object to the trial court's implicit denial of his motion to withdraw the plea. In addition, the People argue that remanding this case for a hearing on the motion to withdraw the guilty plea would reward appellant's disobedience of the lower court's November 12, 2003, order that he appear for sentencing pursuant to the *Vargas* waiver.

Preliminarily, a brief review of the facts is in order. Appellant first informed the court that he wished to withdraw his guilty plea on February 25, 2004, the date he was to be resentenced on the *Vargas* waiver. On that date, the trial court directed the court reporter to prepare a transcript of the September 26, 2003, proceedings at which appellant entered his guilty plea. We note that the minute order for that date characterizes the next hearing (March 24, 2004) as "Hearing re: Status of Motion." In addition, the minute

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⁵ The trial court granted appellant's certificate of probable cause.

orders for each of the many continued hearings after appellant first indicated he wanted to withdraw his plea, through November 12, 2004, characterize the purpose of each hearing as “Status of Motion/Resentencing on *Vargas*” or “Status of Motion/Resentencing.” Thus, it was clear from the beginning that appellant wished to have the trial court consider whether to allow him to withdraw his guilty plea.

On March 24, 2004, appellant again appeared to be resentenced on the *Vargas* waiver, but all proceedings were suspended when defense counsel declared a doubt as to appellant’s mental competence under section 1368. At that time, the trial court directed defense counsel to be prepared to “address the issue of how that 1368 may influence his sentencing on the *Vargas* waiver” at the next hearing. On April 28, 2004, the trial court declared appellant competent and reinstated all proceedings. Defense counsel indicated that he was researching the issue of appellant’s mental capabilities at the time of the *Vargas* waiver.⁶ Counsel also told the court that appellant wanted to withdraw his guilty plea, but counsel was not sure “there’s statutory grounds to do so or not.” The trial court offered to give defense counsel “a thumbnail sketch,” but counsel declined. The court then said, “You do what research you think is necessary.” Again, all parties were aware that appellant wanted to withdraw his guilty plea if the court would allow him to do so.

After a *Marsden* hearing on November 30, 2004, new defense counsel was appointed on December 7, 2004. On that date, appellant’s desire to withdraw his plea

⁶ Defense counsel actually said, “There are other issues as to the trailing case, as to the *Vargas* case, as to my client’s mental capabilities and status as of the time of that injury. So I’m researching that particular issue.”

was again mentioned and a hearing set for January 25, 2005, on a “Possible Motion.” That hearing was continued several times and on June 21, 2005, the trial court set a briefing schedule on the motion to withdraw the plea. Both appellant and the People submitted written arguments, neither of which questioned the trial court’s authority to grant the motion.

At the hearing at issue here, on September 28, 2005,⁷ appellant first pled guilty to the single charge in the forgery case. The trial court then addressed the burglary case, stating, “And there was a motion to withdraw the plea that was decided” The court did not discuss the motion further and went on to recite the terms of the *Vargas* waiver. The record does not show that the court had previously decided the motion and neither party to this appeal contends that the court had done so. The trial court recalled that it had agreed to resentence appellant on the *Vargas* waiver in order to preserve his right to appeal that conviction. The court resented appellant to the original 17-year term. At that point, appellant reminded the court of his motion to withdraw his guilty plea.

“THE DEFENDANT: Can I say something on the record, your Honor?

“THE COURT: Yes, sir, you may.

“THE DEFENDANT: When I entered into that plea agreement, the one you just sentenced me on --

“THE COURT: Yeah.

⁷ The minute order for that date describes the proceedings as “Action came on for Motion to Withdraw Plea/Sentencing.” The minute order then states, “Defense counsel
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“THE DEFENDANT: -- I really didn’t understand my rights, *and that’s what the motion was about. You never heard it*, I guess, because the time I got transferred up, and for the last two years, I’ve been waiving time until we put that motion in stating that, and then you said that the time restraints were up.

“THE COURT: See, I don’t accept that.

“THE DEFENDANT: I wanted to say that on the record.

“THE COURT: I don’t accept that, Mr. Newquist. And the reason I don’t accept that is you signed the written plea agreement, and that plea agreement was gone over with you by the judge before whom you entered that plea. You were represented by an attorney who explained all those rights as indicated by that attorney. So I don’t accept that statement, okay?”

The trial court did not address the merits of appellant’s motion, specifically whether the plea was valid given defense counsel’s concerns about appellant’s mental state voiced in open court earlier on the day of the guilty plea.⁸ It appears likely that the trial court believed it had already ruled that the motion was untimely. We see no indication in the record that the trial court had done so.

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and defendant withdraw motion to withdraw plea”; however, the reporter’s transcript for that date does not anywhere reflect that appellant withdrew his motion.

⁸ On the morning of September 26, 2003, the day appellant pled guilty to the burglary charge, defense counsel asked the trial court for an order that appellant see a doctor to obtain medication for a “mental condition.” Defense counsel also noted that appellant had “mental health issues.”

We find no support in the record for the People's argument that appellant gave up his motion to withdraw the guilty plea in exchange for being resentenced on the *Vargas* waiver so he could appeal the 17-year sentence. This court's reading of the record indicates that appellant consistently pursued his motion to withdraw the guilty plea and that he agreed to be resentenced so he could appeal only in the event the trial court denied the motion.

The People's other argument, that remanding this matter would reward appellant for violating his *Vargas* waiver, is also unavailing. This is because the entire point of a remand would be to allow the trial court to determine whether the guilty plea and resulting *Vargas* waiver were valid in the first place. A motion to withdraw a guilty plea may be brought any time before judgment (§ 1018) and appellant could have done so even if he had appeared for sentencing in the first place.

“‘The proper exercise of discretion requires the court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision. [Citation.]’ [Citation.]” (*People v. Stark* (2005) 131 Cal.App.4th 184, 205.) Although we express no opinion whatsoever as to the merits of appellant's motion to withdraw his guilty plea, we conclude that due process requires the trial court to hold a meaningful hearing on the motion.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court to resolve appellant's motion to withdraw his guilty plea by conducting a hearing in accordance with section 1018. If, after the hearing, the trial court determines in its discretion that

appellant has shown good cause, the court shall permit the plea of guilty to be withdrawn and a plea of not guilty substituted. If good cause is not shown, the trial court shall reinstate the original judgment and sentence.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.